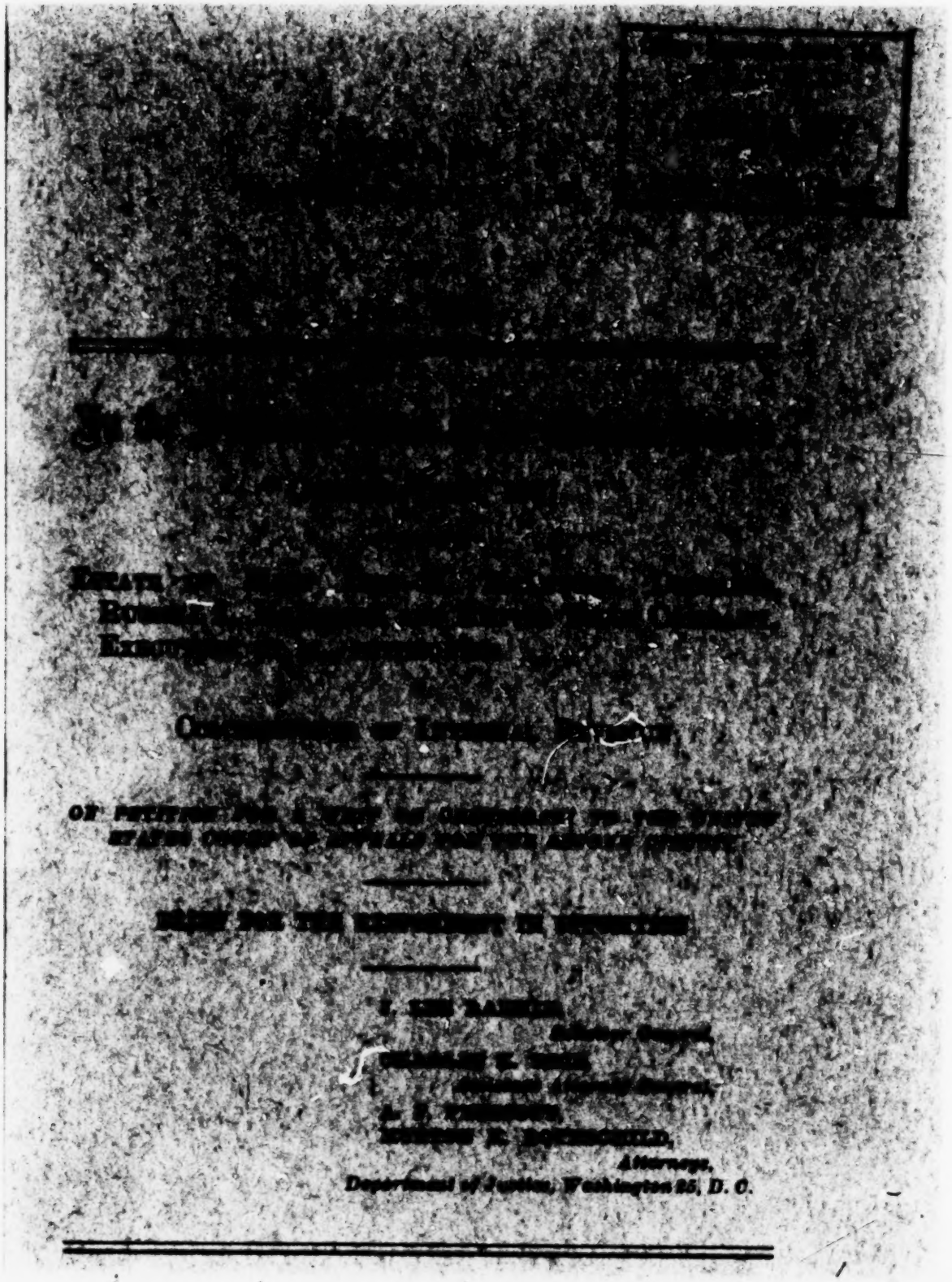


Attorneys,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 625

ESTATE OF MARY LOIS K. MCINTOSH, DECEASED, RUSSELL L. MCINTOSH AND EMPIRE TRUST COMPANY, EXECUTORS, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 6a–27a)[1] is reported in 25 T. C. 794. The opinion of the Court of Appeals (Pet. 15–22) is reported in 248 F. 2d 181.

JURISDICTION

The judgments of the Court of Appeals (Pet. 23–26) were entered on August 30, 1957. The petition for a writ of certiorari was filed on November 25, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

[1] Record references are to the Appendix to the taxpayer's brief filed in the Court of Appeals.

QUESTION PRESENTED

Whether there is sufficient evidence to support the concurrent findings of the Tax Court and the court below that the decedent's relinquishment of her reserved power of appointment was made in contemplation of her death within the meaning of Section 811 (d) (2) of the Internal Revenue Code of 1939.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (d) Revocable Transfers—
>
> * * * * *
>
> (2) *Transfers on or prior to June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a

transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph;

(26 U. S. C. 1952 ed., Sec. 811.)

* * * * *

Treasury Regulations 105, promulgated under the Internal Revenue Code of 1939:

SEC. 81.16 *Transfers in contemplation of death.*—Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A transfer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

The phrase "contemplation of death," as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition.

* * * * *

STATEMENT

The facts as found by the Tax Court (R. 7a–14a), relating to the issue passed upon by the court below, may be summarized as follows:

Mary Lois K. McIntosh (hereinafter sometimes called the decedent) died on May 21, 1949, aged 63 years, nine months. Her executors filed an estate tax return on August 21, 1950, with the Collector of Internal Revenue for the District of Connecticut. (R. 7a.)

In 1928 the decedent was sued in an alienation of affections suit and as a result she turned over to her then husband certain negotiable securities for management. She soon became apprehensive of her husband's management of the property and sought assistance in securing its return. (R. 7a.)

These troubles worried the decedent (who was then Mary Lois K. Perry) and for the purpose of protecting her properties against herself and generally against the misapplication of her funds she arranged for the creation of a trust on February 16, 1929. On that date she conveyed certain of her properties to Thomas J. Boland, a young lawyer in the office of Paul Bakewell, Jr. Boland, as nominal settlor, on the same day conveyed the properties to the St. Louis Union Trust Company and to Bakewell, as trustees, under a written trust instrument. The use of Boland as nominal settlor was made in an attempt to avoid the rule of Missouri law that a settlor cannot create a spendthrift trust for his own benefit. The trust that was created and is here involved is a spendthrift trust. (R. 7a–8a.)

The trust instrument provided, *inter alia*, that the trust should continue for the sole use and benefit of Mary Lois K. Perry during her life; that the trustees should pay the entire net income from the trust to Mary Lois K. Perry in monthly installments; that on the death of Mary Lois K. Perry, the trust should end and the entire trust estate should go to such parties as Mary Lois K. Perry might, by her last will, direct; and that in the event Mary Lois K. Perry should die intestate, or should fail to exercise the power by her last will, then, on her death, the entire trust estate should go to her heirs at law under the laws of Missouri. (R. 8a–10a.)

The decedent executed a will on May 10, 1935, with a codicil dated April 8, 1936, in which she undertook to exercise the power of appointment contained in the trust instrument. (R. 12a.) In June 1941, the corporate trustee wrote to the decedent advising her that there would be a tax advantage if she did not exercise the power of appointment and suggesting that she consult her attorney. (R. 11a–12a.) As a result of this suggestion, an attorney was consulted and a new will was executed on July 14, 1941, in which the decedent specifically refrained from exercising the power. (R. 12a.)

Later, on May 27, 1943, in accordance with its policy of reviewing all trust instruments providing for a power of appointment, the corporate trustee advised the decedent by letter that her powers under the trust instrument should be reviewed in the light of changes in the tax laws contained in the Revenue Act of 1942.

Following this advice, an attorney was employed. He advised that the property in the trust would be taxable as part of the decedent's estate unless the power of appointment was released by her before March 1, 1944. (R. 12a–13a.) Accordingly, the decedent executed the following "Release of Power" on November 4, 1943 (R. 13a–14a):

> *Whereas*, the undersigned is desirous of releasing and relinquishing the said power of appointment forever to, and in favor of, the persons who may be or become entitled to receive the property heretofore subject to the said power of appointment in the event that such power be not exercised,
>
> *Now, therefore*, the undersigned does hereby, irrevocably and forever, release and relinquish all power which she now has, or at any time hereafter may have had, to direct, nominate, or appoint the parties to whom the Trust Estate created by the Deed of Trust dated February 16, 1929, made by Thomas J. Boland, and any and all accumulated and undistributed income therefrom, shall go upon the termination of the said Trust, or to impose any terms and conditions with respect to the final distribution of said Trust Estate, and
>
> The undersigned does hereby covenant with Russell L. McIntosh and St. Louis Union Trust Company as Trustees of said Trust, for and in behalf of the heirs at law of the undersigned, under the statutes of descent and distribution of the State of Missouri, and with Eugene Kilpatrick Perry, the sole apparent heir at law of the undersigned under such statutes, that there is not now in existence any will or other

testamentary document executed by her which purports to exercise the aforesaid power of appointment, and that she will not hereafter execute any such will or testamentary document.

The decedent's purpose in releasing the power of appointment was to save estate taxes. At the time she executed the release of power of appointment, the decedent was in good physical condition for a woman of her age, and she had no particular concern about dying. (R. 14a.)

The Commissioner determined a deficiency of $254,759.76 in estate tax to be due from the estate of Mary Lois K. McIntosh. The same deficiency has been determined against the other petitioners as transferees. (R. 7a.)

The Tax Court decided that the decedent was the real settlor of the trust set up in 1929 and should be considered as having made the transfer in trust (R. 16a); that the decedent was the only beneficiary under the trust and, consequently, had the power to revoke the trust under Missouri law; and that the value of the trust property is includible in her gross estate under Section 811 (d) (2) of the Internal Revenue Code of 1939 (*supra*, pp. 2–3) (R. 19a). The Tax Court also decided that the dominant motive of the decedent in relinquishing the power of appointment was to save estate taxes, and therefore the relinquishment was in contemplation of death. (R. 23a–25a.) Decisions were entered against the decedent's estate for a deficiency in estate taxes in the amount of $235,872.10 and against the trustees and the decedent's son for transferee liability in a corresponding amount. (R. 3a–

5a.) The decedent's estate and the transferees appealed to the court below.

The court below unanimously held that the Tax Court was correct in finding that the decedent released her power of appointment in contemplation of death within the meaning of Section 811 (d) (2). It was therefore unnecessary to consider the other question decided by the Tax Court or the alternative argument made in the Government's brief in the court below. (Pet. 17.)

ARGUMENT

Petitioners do not question the rulings below that the power reserved to the decedent in the 1929 trust was a power to alter, amend, or revoke within the meaning of Section 811 (d) (2) of the Internal Revenue Code of 1939 (*supra*, pp. 2–3). The sole question raised by the petition is whether on the record the two courts below were justified in finding that decedent relinquished that power in contemplation of her death.

The decision of the court below is correct. Section 811 (d) (2) provides in part that the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property to the extent of any interest therein of which the decedent has at any time made a transfer by trust, where he relinquished the power to alter or amend in contemplation of his death. Here, disregarding the conveyance by the decedent to the straw man, she created a trust in 1929 reserving the entire

net income to herself for life and also reserving the power to appoint by will the corpus.[2] (R. 7a–10a.) That the power to appoint by will the corpus is a power to alter or amend within the meaning of the statute is not questioned here. On November 4, 1943, the decedent formally relinquished her power of appointment (R. 13a–14a), and the only question considered by the court below was whether the decedent relinquished that power in contemplation of death under the terms of the statute. Under decisions of this Court in analogous cases, the test is whether the thought of death is the impelling cause of the transfer. *United States* v. *Wells*, 283 U. S. 102, 119; *City Bank Co.* v. *McGowan*, 323 U. S. 594, 599; *Allen* v. *Trust Co. of Georgia*, 326 U. S. 630, 635.

The Tax Court found that the decedent's dominant motive in releasing her power of appointment was to save estate taxes. (R. 23a.) In support of that conclusion, the Tax Court referred to the letter of May 27, 1943, in which the decedent was advised by the corporate trustee that because of recent changes in the federal tax law her possession of a power of appointment could cause the value of the trust property to be included in her estate for estate tax purposes. (R. 23a, 29a, 38a.) The Tax Court also referred to a letter dated June 23, 1943, received by the decedent's husband, in which he was advised by a lawyer that decedent would have to give up the power of appointment to keep the value of the trust property from

[2] The petitioners do not dispute the fact that the power is a reserved power rather than a donated power, even though the trust was nominally created by a third party. (Pet. 7.)

being included in her estate under certain amendments to the estate tax law enacted in 1942. (R. 23a, 29a, 30a, 41a–43a.) The Tax Court found also that the decedent acting on this advice executed the release dated November 4, 1943. (R. 23a, 29a, 44a–46a.) In addition to the above mentioned evidence, the decedent's husband testified that he knew of no other reason for the relinquishment of the power by the decedent than to save taxes. (R. 67a.) The court below referred to this testimony (Pet. 20) and correctly decided that the evidence sustains the Tax Court's finding that the decedent relinquished the power in contemplation of death. (Pet. 21.)

The motive to avoid estate taxes is clearly a death motive rather than a life motive. *Vanderlip* v. *Commissioner*, 155 F. 2d 152 (C. A. 2d), certiorari denied, 329 U. S. 728; *Slifka* v. *Johnson*, 161 F. 2d 467 (C. A. 2d), certiorari denied, 332 U. S. 758. To the same effect is Section 81.16 of Treasury Regulations 105 (*supra*, p. 3), which provides in part that a transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax.

No reason appears for review of the concurrent findings of the Tax Court and the court below that the decedent's dominant motive in releasing the power of appointment was a death motive and that the power to amend was relinquished in contemplation of death within the meaning of Section 811 (d) (2). The petitioners do not allege that there is a conflict of decisions, and there is none. With respect to *Allen* v. *Trust Co. of Georgia*, 326 U. S. 630, cited by the petitioners (Pet. 12), there the trier of fact, affirmed on

review, found that the decedent did *not* relinquish his power to amend the trusts in contemplation of death, whereas in this case the trier of fact, affirmed by the court below, found that the decedent *did* relinquish her power of appointment in contemplation of death. The difference in result is attributable, not to any real difference in legal criterion, but rather to the substantial factual differences, noted by the court below (Pet. 22), between the two cases.

There is no merit to the petitioners' argument that this Court should determine the relevance of Section 501 (e) of the Revenue Act of 1950, c. 994, 64 Stat. 962 (26 U. S. C. 1952 ed., Sec. 811), to the present case (Pet. 12–14). Section 501 (e) of the 1950 Act expressly provides that the amendment shall be applicable only with respect to estates of decedents dying after the enactment of that Act (September 23, 1950). The decedent having died on May 21, 1949 (R. 7a), the amendment does not apply.

CONCLUSION

The decision of the court below is correct, there is no conflict, and no question of general importance is presented. Accordingly it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

A. F. PRESCOTT,
MORTON K. ROTHSCHILD,
Attorneys.

DECEMBER 1957.